Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

BRIEF OF PETITIONER SOUTHERN INDEPENDENT SCHOOL ASSOCIATION

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BRIEF OF PETITIONER SOUTHERN INDEPENDENT SCHOOL ASSOCIATION

To the Honorable the Justices of the Supreme Court of the United States:

Pursuant to your grant of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter, the above named petitioner,

herein referred to as SISA, submits its brief on the merits and prays a reversal of the said judgment and reinstatement of its counterclaim.

OPINIONS BELOW

The majority and minority *en banc* opinions of the Fourth Circuit Court of Appeals on the merits and its opinion denying rehearing, are officially reported at 515 F.2d 1082 *et seq.* and have been reprinted in the consolidated Appendix starting at page A. 4. The opinion and order of the United States District Court for the Eastern District of Virginia, Alexandria Div. (Bryan, J.) is reported at 363 F. Supp. 1200 and has also been reprinted with its two supplements in the Appendix at page A. 133.

JURISDICTION

The judgment below was entered on April 15, 1975 and rehearing was denied with opinion on May 29, 1975. SISA's petition for review by writ of certiorari was filed in this Court on August 22, 1975 and was granted on November 11, 1975. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

The Court of Appeals, pursuant to 28 U.S.C. § 2403, has certified to the Attorney General that the constitutionality of 42 U.S.C. § 1981 may be drawn into question in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. XIII.

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1981. Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

QUESTION PRESENTED

Does 42 U.S.C. § 1981 compel desegregation of private schools?

STATEMENT OF THE CASE

Proceedings Below

In the District Court two Negro minors alleged an appropriate level of scholastic competence and prayed relief for the asserted refusal to admit them on racial grounds to defendants' allegedly white private school in Arlington (A. 95). The complaint asserted that admission to any private school constitutes a "contract" within the meaning of that term as used in 42 U.S.C. § 1981 (A. 95) and consequently any racial limitation on private school admission was a denial to them and their class of the same right "to make and enforce contracts . . . as is enjoyed by white citizens" (A. 95).

These allegations and assertions were denied by the answers, (A. 99-101).

SISA, an association of six state organizations of non-profit private schools—some of which are conceded to have racial limitations on admission—was allowed intervention by the District Court, (A. 129). By answer SISA denied that § 1981 conferred on the infant plaintiffs a right of compulsory admission to any private school (A. 125).

By counterclaim, SISA alleged the absence of any state action in the establishment or operation of its schools and that admission to such schools was based on the subjective approval of each applicant by officials of the school. SISA further alleged that its schools had attained an academic proficiency well above that of the local public schools and that such schools had few disciplinary problems, asserting that these conditions were the result of limiting school attendance to a single homogeneous group (A. 126-128).

In proof of these allegations SISA first stipulated with plaintiffs as follows:

> 1. A substantial proportion of the schools represented by intervenor deny admission to applicants of the Negro race.
>
> 2. The schools represented by intervenor admit applicants only in the discretion of the school authorities.
>
> 3. The schools represented by intervenors are privately owned, financially supported by tuition paid by the parents of the students and, in some cases, supplementary private gifts.
>
> 4. The schools represented by intervenors are located in areas having cost-free, desegregated public education available to all children, and the parents of the students in schools represented by intervenors

are taxpayers who pay their proportionate share of federal, state and local taxes for the maintenance of such public system of education.

5. The sole basis of jurisdiction asserted by plaintiffs in this action is 42 U.S.C. § 1981. (A. 131).

SISA also produced two school officials to testify that its private schools were achieving demonstrably higher academic levels than the public schools of their area and had few or no disciplinary problems (A. 226a) and offered the testimony of a university professor to show first, that this would be the normal expectation when teaching to students having common self-identity and learning patterns and second, that in the light of current controversies about educational methodology, the selection of a limited admission school was not an irrational choice (A. 149-153) by these parents. This testimony and the supporting exhibits were admitted by the District Court subject to reserving its ruling on an objection to relevance. No evidence to the contrary was offered.

On the basis of its counterclaim and proffer of evidence, SISA prayed for a counter-declaration of the Constitutional right of any parent to select a private school expressing the parent's educational beliefs or individual philosophy (A. 128).

On July 27, 1973, after trial, the District Court ruled that the defendants' school had excluded the infant plaintiffs some three years earlier by reason of their race and that an infant plaintiff had in the interim been admitted to a private integrated school of his choice in the Washington area and was doing well. (A. 136)

On the law, the Court ruled that under this Court's *Tillman* decision (*infra*), 42 U.S.C. § 1981 was applicable to private as well as state-enforced discrimination, that in any event the defendant school was not "truly private" since it was "open to every white child," and

therefore admission to a white private school was a right to "contract" within the intendment of § 1981. The Court further held that since § 1981 was limited in terms to rights ". . . enjoyed by white citizens," its prohibitions would not be applicable to bar racial discrimination by non-white races or by private all-Negro, all-Chinese or rabbinical schools (A. 139). The Court denied class representation by any party (A. 138).

By its order the District Court granted plantiffs' requested declaration that racial discrimination in white private school admissions violates § 1981 (A. 141). It held SISA's evidence of the scholastic value of segregation in education was irrelevant under this Court's ruling in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and accordingly dismissed SISA's counterclaim for failure to state a cause of action (A. 132a).

The District Court enjoined the defendant school and all private schools associated with SISA from denying admission to Negro applicants (A. 141-142) and awarded damages (A. 142).

An appeal was taken by SISA to the Fourth Circuit Court of Appeals from the District Court's dismissal of its counterclaim and its correlative declaration of a statutory right in the Negro plaintiffs to compel admission to private white schools.

The appeal was heard *en banc* on April 2, 1974. The decision of the Fourth Circuit was issued on April 15, 1975. Four of the seven judges affirmed the holding of the District Court, citing *Jones* v. *Mayer*, 392 U.S. 409 (1968), *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969) and *Tillman* v. *Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973) as binding precedent requiring such a result.

> As an intellectual exercise, the historical reading and interpretation of the majority in *Jones* v. *Mayer*

> may be debatable . . . That reading and interpretation was followed in *Sullivan* v. *Little Hunting Park* and in *Tillman* v. *Wheaton-Haven*, however, and, for us, is firmly established.
>
> 515 F.2d 1082, 1087 (A. 12).

The majority opinion further denied that the issue had been previously determined by this Court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). The opinion then concluded

> Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.
>
> 515 F.2d at 1087-88 (A. 14).

In the Court of Appeals three judges dissented on the ground that the question was "one of first instance in any federal court at this or higher level," (A. 25) that *Jones*, *Sullivan*, and *Tillman* were not controlling since they dealt with rights in real property under § 1982, and that the right to make contracts "does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (A. 26). The dissenters further argued that the overriding issue of public policy was the right of association of the parents as described by this Court in "*Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974)" (A. 26). The minority then concluded:

As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 U.S.C. § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood* v. *Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged was neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

515 F.2d at 1096-97 (A. 34).

From the ruling of the Fourth Circuit, all parties filed petitions in this Court for review by writ of certiorari. The petitions were granted on November 11, 1975 and consolidated for argument with companion cases (Nos. 72-62, 75-66, 75-306). Pending final deter-

mination of the issue by this Court, the Court of Appeals has stayed enforcement of the order of the District Court (A. 44a, b).

SUMMARY OF ARGUMENT

I

The application of the 1866 Civil Rights Act to restrain acts of private discrimination perpetuating badges or incidents of slavery starts with the decision of this Court in *Jones* v. *Mayer* in 1968. But the majority judges of the Fourth Circuit Court of Appeals were in error in holding that ruling and the related decisions in *Sullivan* and *Tillman*, compelled an interpretation of § 1981 to bar discrimination in private school admissions. *Jones*, *Sullivan* and *Tillman* were concerned only with the denial to blacks of the unrestricted acquisition and use of real property under § 1982, an historic disability recognized as one of the badges of slavery.

II

The District Court and the Fourth Circuit majority were also in error in holding that the issue now presented had not previously been considered by this Court in *Coit* v. *Green*, *Norwood*, and *Gilmore*, sustaining the right of these private schools to retain their existing admission policies.

III

To the extent that the question may still be open, SISA argues that the phrase "equal benefit of all laws" makes § 1981 inapplicable to private school admissions either in words or by purpose. Contract law has always required acceptance as well as offer and under the law no "white person" has ever had a right to compel a truly private organization to admit him to membership.

IV

The reading of § 1981 given by the Fourth Circuit would create a direct conflict between the freedom of association of parents under the First Amendment to select schools of their choice for their children on the one hand and, on the other, the direction to eliminate badges and incidents of slavery pursuant to Congressional authority granted under the Thirteenth Amendment. In any such conflict the Bill of Rights provisions would prevail.

V

The growing weight of decision distinguishing between religious and racial selectivity as "good" and "evil" forms of discrimination, denies to parents their fundamental constitutional right to be free of judicial value judgments on the rightness of their beliefs, contradicts the evidence in the record, and opposes national policy favoring a pluralistic society.

ARGUMENT

I

Your Decisions in *Jones*, *Sullivan* and *Tillman* are Not Determinative on the Interpretation of § 1981. Those were Rulings on § 1982 Real Property Rights

In *Jones* v. *Mayer* this Court took note that only state-supported discrimination had been prohibited by the Fourteenth Amendment. But you further held that the delegation of authority given to Congress by the second paragraph of the Thirteenth Amendment was adequate to support legislation directed against forms of individual discrimination which had historically been a "badge or incident of slavery." On the basis of your reconsideration of the legislative history of the 1866 Civil Rights Act, you concluded that the 42 U.S.C.

§ 1982 had been intended by Congress for this purpose and was therefore applicable to prohibit private racial bias burdening the right of blacks to purchase an unrestricted title in real property. This view was adhered to in your subsequent decision in *Sullivan* v. *Little Hunting Park, Inc., supra.*

In dissenting from the opinion of the District Court and the majority in the Court of Appeals, the minority judges of the Fourth Circuit said that this same question of property right was the basis for your *Tillman* opinion. SISA concurs. The complaint in *Tillman*—as in *Jones*—did make reference to § 1981 as well as § 1982 and this could be a reason why the Courts below cited your *Tillman* holding as compelling an equally broad reading of the "contract" phrase in § 1981. But your holding was not to that effect. On its facts, *Tillman* was a § 1982 case and dealt—as had *Jones* and *Sullivan* —with the scope of rights which a black purchaser would acquire as part of a purchased real property interest.

> When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area.
>
> . . .
>
> We hold, as a consequence, that *Wheaton-Haven* is not a private club and that it is not necessary in this case to consider the issue of any implied limitation of the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000 a(3), is under consideration. Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed. 2d. 627 (1972); Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed. 318 (1969).
>
> 410 U.S. 437, 438-9, 93 S.Ct., 1090, 1094 (1973).

And on the *Tillman* remand, the District Court confirmed that the action so taken by this Court was based

on the property clause in § 1982, 367 F. Supp. 860 (D. Md. 1973). This was equally the view of Judge Hodges in *Riley* v. *Adirondack School for Girls*, 368 F. Supp. 392, 396-7 (M.D. Fla. 1973).

Accordingly it is SISA's position that the holdings of this Court in *Jones*, *Sullivan*, and *Tillman* on the application of the 1866 Act to incidents of private discrimination perpetuating badges or incidents of slavery by restricting real property interests, are not controlling precedent requiring in addition that the contract phrase of § 1981 be made applicable to forbid parental discrimination in private school selection.

II

This Court Has Previously Held That The Private White Schools of SISA Constitute a Permissible Expression of the Parents' Freedom of Association

If *Jones*, *Sullivan*, and *Tillman* are not controlling, is the issue a *tabula rasa* as the Court of Appeals minority held? SISA says "No".

The constitutional freedom of parents to associate their children in SISA schools was necessarily decided by this Court in three cases which involved differing questions of state assistance. SISA schools were denied use of free state textbooks in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), refused the otherwise customary use of public athletic grounds in *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556 (1964), and had their educational tax exemptions withdrawn in *Coit* v. *Green*, 404 U.S. 907 (1971) (*aff'g. per curiam Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

In *Norwood* (p. 469) it was held

> The private school that closes its doors to defined groups of students on the basis of constitutionally

> suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

In *Gilmore* you ruled that "private segregated school groups" should not be given exclusive use of city owned recreational facilities on the same basis as others, but saying also (417 U.S. at 575)

> We close with this word of caution. It should be obvious that the exclusion of any person or group—all-Negro, all-oriental, or all-white—from public facilities infringes upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in *Moose Lodge*. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180, 92 S.Ct., at 1975. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change.

The three-judge opinion which was summarily affirmed by this Court in *Coit* v. *Green*, stated of these SISA schools,

> The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the constitutionally protected right to belong to political groups

> embracing both legal and illegal aims so long as one does not intend to engage in acts in furtherance of their unlawful purposes. Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966). "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 415, 444-445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963).
>
> Neither plaintiffs' prayers nor defendants' policy seeks to stop intervenors from sending their children to segregated private schools at their own expense, paying the full cost of education at such schools.
>
> 330 F. Supp. 1150 at 1166, *aff'd. per curiam* 404 U.S. 997, 92 S.Ct. 564 (1971).

SISA points out that in each of these decisions the constitutionality of the continued association of children in these segregated private schools of SISA was an essential predetermination to the actual holding. Thus, while SISA necessarily concedes that none of the judges below have agreed with this reading of these opinions, it is still the position of SISA that the issue now presented to this Court has previously been determined not once, but on three separate occasions.

III

In Any Event § 1981 Does Not Extend to Private School Admissions Either by Language or Purpose

It is a hornbook rule of statutory construction that statutes should be read to avoid the raising of substantial constitutional questions, *Lynch* v. *Overholser*, 369 U.S. 705, 708, 82 S.Ct. 1063, 1067 (1962), *Green*

v. *Connally, supra.* And that a federal statute must be read within the constitutional powers granted to Congress, *Powell* v. *McCormack*, 395 U.S. 486, 506, 39 S.Ct. 1944, 1956 (1969), *Grosjean* v. *Amer. Press Co.*, 297 U.S. 233, 56 S.Ct. 444 (1936), *United States* v. *Brignoni-Ponce*, —— U.S. ——, 95 S.Ct. 2574 (1975).

Therefore, any present resolution of an asserted conflict of constitutional right between the First and Thirteenth amendments is unnecessary unless and until it is first held that in the words of § 1981 a denial of private school admission on any ground denies a right to "make and enforce contracts" which is possessed by other citizens of whatever color, religion, sex or national origin. SISA denies that such a right exists under this language or has ever existed in the law as a badge or incident of slavery or otherwise.

SISA must of course accept the legal definition of the relationship between any private organization and its dues or tuition paying members as a "contract". Virtually every event in life which involves personal discriminatory expression, from marriage to the taking of holy orders, is contractual in some legal sense. Given the ubiquity of the "contract" concept, any reading of § 1981 as applicable to every legal relationship would make it a Pandora statute reversing the most fundamental prerequisites of accepted contract doctrine.

But if the statutory "contract" phrase in § 1981 means less than all the transactions viewed by the law as "contracts", how may the limitation be defined judicially? The Fourth Circuit minority suggested the use of a division on the basis of "primary" and "secondary" relationships (A. 31-32). But SISA would argue that this is unnecessary since any of the three standard methods of statutory interpretation would suffice for the purpose; first by simply reading the statutory language for its plain meaning, "the *same right* . . . to make and en-

force contracts . . . as is enjoyed by white citizens . . .". If any ambiguity remains then, second, by reading the phrase in the light of the statute's apparent purpose, and if finally required, by looking to the specific Congressional intent in passing the law. In the view of SISA the "contract" phase in § 1981 would not extend to discrimination in private school admissions under any one of these three tests.

A. *A Private Contract Requires the Assent of Both Parties*

The District Court granted to plaintiffs the right to compel the making of an agreement by an unwilling private contractor. That is a power which the law neither now nor at any known time in the past has recognized as coming within the meaning of the word "contract". Granting that public offers of reward as well as adhesion contracts may raise occasional questions of the identity of the offeree or the actuality of the acceptance, neither is involved here.*

The pre-condition of the law of contracts in 1866 and today is that acceptance as well as offer must be shown to exist, that a "contract" is a consensual agreement of the parties rather than a power in one to constrain the other. This principle was noted in a Fifth Circuit case arising under the contract phrase of § 1981 in denying a similar claim of power to compel acceptance.

> In short I would say that the "offer" for a unilateral "contract" communicated by the Advertiser is an offer to publish on such terms as it sees fit. It is an offer to exchange only an unenforceable promise to publish. Black citizens then have "the same right

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* And it may be that references by both Courts below outside the record as to the defendant schools being generally open to the public was intended to meet this difficulty, but at best such a conclusion would have no relation to the non-profit SISA schools which by stipulation admit applicants only in the discretion of the school officials.

> . . . to make and enforce contracts . . . as is enjoyed by white citizens." Neither white citizens *nor* black citizens form enforceable contracts of publication with the Advertiser.
>
> *Cook* v. *The Advertiser Co., Inc.*, 458 F.2d 1119, 1124 (5 Cir. 1972, Wisdom, J., concurring.)

B. *Group Membership is Such a Contract*

One application of this general contract principle is by denying claims of right to compel admission to any private organization. We start with the general rule as given in 6 *Am. Jur. 2d* 443 (Assn's and Clubs, § 18):

> Membership in a voluntary unincorporated association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The grant or refusal of membership is within the complete control of the association, and the courts cannot compel the admission of an individual into such an association. If his application is refused, he is entirely without legal remedy no matter how arbitrary or unjust may be his exclusion.

In *Sims* v. *Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972) the contract clause of § 1981 was invoked and the power to compel membership was denied

> If the U.C.T. is in fact a private fraternal order, the availability of inexpensive life insurance being a mere incident or benefit of membership therein, plaintiffs' grievance is based not on defendants' refusal to sell them insurance but rather on defendants' refusal to admit them to membership. And if this is the case, we know of no authority for the proposition that membership in a private organization may be secured by suit under the civil rights statutes.
>
> (343 F. Supp. at 113-114)

Accord, Moose Lodge No. 107 v. *Irvis, supra, MacDonald* v. *Shawnee Country Club, Inc.*, 438 F.2d 632 (6th Cir.), *cert. denied* 403 U.S. 932 (1971), *Wesley* v. *City of Savannah, Ga.*, 294 F. Supp. 698 (S.D. Ga. 1969), *Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), *Chapman* v. *American Legion*, 244 Ala. 553, 14 So.2d 225 (1943), *Dockers' Club, etc.* v. *Race Relations Bd.*, (Hse. of L.) 3 W.L.R. 533 (1974).

Although an exception appears to exist with regard to membership in certain professional societies, in each case it can be shown that the society in question acted as an agency of its state in fixing professional qualification, or in law had exclusive access to limited commercial opportunities, *Goshorn* v. *Bar Assn. of District of Columbia*, 152 F. Supp. 300 (D. D.C. 1957); *Medical Society of Mobile County* v. *Walker*, 245 Ala. 135, 16 So.2d 321 (1944); *Eaton* v. *Bd. of Managers of James Walker Memorial Hospital*, 261 F.2d 521 (4 Cir.), *cert. denied* 359 U.S. 984 (1958); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (9 Cir. 1963), *cert. denied* 376 U.S. 938 (1963); *Hawkins* v. *N. Car. Dental Soc*, 355 F.2d 718 (4 Cir. 1966); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971) *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), 366 U.S. 36 (1961), and *Arnstein* v. *Amer. Soc. of Composers, Authors, etc.*, 29 F. Supp. 388 (S.D. N.Y. 1939).

This division of result occurs also with respect to membership in school associations. In *State of North Dakota* v. *North Central Ass'n., etc.*, 23 F. Supp. 694 (E.D. Ill.) *aff'd.* 99 F.2d 697 (7 Cir. 1938), exclusion from an association of colleges was held to be *damnum absque injuria*,

> In the absence of a breach of law a chancellor is powerless to compel admission by or into such an Association and if one's application is refused, it is equally without power to grant relief.
>
> (23 F. Supp. at p. 700)

To the same effect was the decision in *Parsons College* v. *No. Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967) even though the defendant Association had been granted certain accreditation rights.

> The Court of Appeals for this Circuit has similarly declared that no judge-made principles or statutes are to be applied to control the actions of private associations.
>
> (271 F. Supp. at p. 71)

On the other hand where federal financial benefits were dependent on association membership, admission could be made compulsory, *Marjorie Webster J.C.* v. *Middle States Assn. of Coll. and Sec. Sch.*, 432 F.2d 650 (D.C. Cir.), *cert. denied* 405 U.S. 979 (1970). Schools fall into the same category and are private, not public, absent some overriding state relation, *Weise* v. *Syracuse Univ.* 522 F.2d 397 (2 Cir. 1975), *Powe* v. *Miles*, 407 F.2d 73 (2 Cir. 1968), *Grossner* v. *Trustees of Columbia University in the City of N.Y.*, 287 F. Supp. 535 (S.D. N.Y. 1968), *Browns* v. *Mitchell*, 409 F.2d 593 (10 Cir. 1969), *Brownley* v. *Gettysburg College*, 338 F. Supp. 725 (M.D. Pa. 1972), *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970) *aff'd. per curiam* 445 F.2d 412 (7 Cir. 1971), *Torres* v. *Puerto Rico Junior College*, 298 F. Supp. 458 (D. P.R. 1969).

The absence of any recognized form of state action affecting its schools was alleged and proven by SISA in the District Court, *supra*, p. 4. Hence, if compulsory admission to private organizations is denied by contract law generally applicable to "white citizens", then such a right is equally absent from the meaning of the word "contract" as used in Sec. 1981.

C. *The Statutory Purpose of the 1866 Act was to Equate the Rights of All Citizens, not to Create New Contract Law*

This Court has held that a principal purpose of the Thirteenth Amendment was to maintain a free and voluntary system of labor, *Pollock* v. *Williams*, 322 U.S. 4 (1954); *Taylor* v. *Georgia*, 315 U.S. 25 (1942) eliminating the legal incidents of both slavery and other forms of peonage. As the unanimous Justices of 1883 explained it

> It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.
>
> *Civil Rights Cases*, 109 U.S. 3, 22, 3 S.Ct. 18 (1883)

On slavery, the details of the passage of the 1866 Act under the second paragraph of the Thirteenth Amendment were analyzed by this Court in *Jones* v. *Mayer*. There, as previously noted, you held that the intent of the 1866 Congress was to grant all citizens the "same" right, to forbid those acts of private discrimination which tended to perpetuate legal disabilities which were recognized badges or incidents of slavery.

To find what incidents of slavery were intended to be covered by the 1866 Act, this Court in *Jones* put particular reliance on the Congressional history of that legislation.

Applying the same analysis to the present issue, what is clear is that Congress did not express any intention

to amend existing contract doctrine but rather to give all "inhabitants"

> ". . . the same right to make and enforce contracts, . . ."
>
> (Cong. Globe, Jan. 12, (Senate No. 61) in January, 1866, Senator Trumbull 1866, S. p. 211)

In later versions "inhabitants" became "all persons" and the rights granted were first those of any citizen, later "white" citizens. Congressman Wilson pointed out that he had himself made this last change in the language of the bill

> ". . . to operate as a limitation and not as an extension; . . ."
>
> (Cong. Globe Appx. Mar. 8, 1866, p. 157)

In short, the legislative history of the 1866 Act is clear that its ultimate form was arrived at to *equate* all persons in the existing rights of an adult male citizen, not to grant preferential powers to any group. Therefore, the contract law applicable to "white citizens" in 1866 was the law intended to be applicable to "all persons" thereafter and did not increase or change the position of any person as a potential contractor.

D. *Specifically, The 1866 Congress Did Not Intend the Contract Clause to Apply to School Admissions*

As a general matter the legislative references in point here have been collected by counsel for the petitioner Fairfax-Brewster School (No. 75-66) and the citations are given in that brief. For present purposes, we take a single example, a statement by the Floor Manager for the legislation, Congressman Wilson, whose views were regarded as authoritative by this Court (392 U.S. 409, 425). Wilson told the 1866 Congress that the "contract" language of Section 1981 would not require school integration;

> This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities". What do these terms mean? Do they mean that in all things civil, social, political, all citizens without distinction of race or color, shall be equal? By no means can they be so construed. . . . Nor do they mean that all citizens shall sit on the juries or that their children shall attend the same schools. These are not civil rights or immunities." (Cong. Globe 1866, Mar. 1, p. 1117)

* * * *

Neither by language, legal implication, nor Congressional intendment was the 1866 Act made applicable to private school admissions. Accordingly, there is neither a Constitutional conflict or even a Constitutional question in this case. And in case of doubt, it has been the often repeated direction of this Court to interpret any statute to avoid Constitutional questions, *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351 (1937); *Crowell* v. *Benson*, 285 U.S. 22, 46, 62 (1932); *Grenada County* v. *Brown*, 112 U.S. 261, 269 (1884); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940); *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 115 (1939); *Stephenson* v. *Binford*, 287 U.S. 251, 277 (1932).

IV

If § 1981 Does Authorize Private School Desegregation, The Statute is in Such Part Unconstitutional

If the admission policy of SISA schools exists as an expression of First Amendment rights of association of the parents, then the 1866 Act is void except to the extent that a diminishing of the freedoms preserved by the Bill of Rights is directly required under the Thirteenth

Amendment. SISA argues that no such direction was contained in or implied by the Thirteenth Amendment and the rulings below are therefore in error in extending the contract phrase of § 1981 to include private school admissions.

1. We start with the First Amendment rights of association, a fundamental liberty conceded to exist with respect to parents by all eight judges in the courts below. This right of association protects organizations furthering racially motivated policies, *NAACP* v. *State of Alabama*, 357 U.S. 449 (1958), *NAACP* v. *Button*, 371 U.S. 415 (1963), *Gibson* v. *Florida Leg. Investig. Comm.*, 372 U.S. 539, 546 (1963), *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), and although all such cases exemplify the freedom in black association, the decisions are clear that the rule would apply to whites as well as blacks. As said in *Button*

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, political or religious affiliation of the members of the group which invokes its shield, or to the true popularity, or social utility of the ideas and beliefs which are offered.
>
> (371 U.S. at pp. 444-5)

As the *Green* Court noted, popularity of opinion is not required. Association is permitted for the peaceful advocacy of anti-constitutional or even illegal ends, *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238 (1966) to retain communists in defense security positions, *U.S.*

v. *Robel*, 389 U.S. 252, 88 S.Ct. 419 (1967), and federally subsidized shipping, *Schneider* v. *Smith*, 390 U.S. 19, 88 S.Ct. 682 (1968), to favor a political dictatorship, *Schneiderman* v. *U.S.*, 320 U.S. 118, 63 S.Ct. 1333 (1943), or the establishment of a Nazi state, *U.S.* v. *Korner*, 56 F. Supp. 242 (S.D. Cal. 1944), *National Socialist White Peoples Party* v. *Ringers*, 473 F.2d 1010 (4 Cir. 1973), to oppose national policy or law, *Bond* v. *Floyd*, 385 U.S. 116, 87 S.Ct. 339 (1966), or to teach racial supremacy, *Cooper* v. *Pate*, 382 F.2d 518 (7 Cir. 1967). The Grand Wizard of the Ku Klux Klan could not be denied public employment because of his racial beliefs, *Murray* v. *Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971), separate education for men and women is permissible where coeducational facilities are also available, *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd.* 401 U.S. 951, 91 S.Ct. 976 and sex-exclusive private associations are valid despite government funding or commercial activity, *The New York City Jaycees, Inc.*, v. *The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975), *Kiwanis Club of Great Neck* v. *Kiwanis International*, 374 N.Y.S. 2d 265 (1975).

Such freedom of association may not be discouraged whether it be ultraconservative or ultraliberal, *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489 (D.C. Cir. 1968). In that decision the now Chief Justice took occasion to say

> . . . programs of "political education" some of which contain overtones of anti-semitism and racism . . . however reprehensible, are within the areas covered by the First Amendment.

Or, as expressed in one of the famous dissents of Justice Holmes, since become the doctrine of the Court,

> If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free

> thought for those who agree with us but freedom for the thought that we hate. *U.S.* v. *Schwimmer*, 279 U.S. 644, 49 S.Ct. 448 (1929)

In applying this doctrine to non-public schools the quotations given above in Point II from the *Norwood* and *Green* decisions describe and reference the constitutional character of the right of all parents to send their children to schools of their choice—a freedom to find an expression of their beliefs through association of their children in particular schools. That parental right was reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965), where, in relying on *Pierce* v. *Society of Sisters/Hill Military Academy*, 268 U.S. 510, 45 S.Ct. 571 (1925), First Amendment freedoms were defined to include:

> . . . the liberty of parents and guardians to direct the upbringing and education of children under their control.
>
> . . .
>
> The right to educate a child in a school of the parents' choice—whether public or private or parochial—. . . to study any particular subject or any foreign language . . . to express one's attitudes or philosophies. . ." (381 U.S. at pp. 482-83)

Adherence to First Amendment standards is of particular importance where schools are involved,

> The classroom is peculiarly the "marketplace of ideas."
>
> *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967)

Accord, Tinker v. *Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

The *Pierce* principle applies to racial groups. Back in 1927 this Court said

> The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.
>
> *Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927)

The underlying rationale of *Pierce* was explained in *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 242, 83 S.Ct. 1560, 1582 (1963), quoted above in part from the decision of the *Green* Court.

> Attendance at public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experience of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent." (Brennan, J., concurring)

If the SISA parents have a right to select a school for their children that expresses their own preferences and

beliefs, is that right invaded by the decisions below? Clearly so. Every parent who selects a SISA school because of a belief that "segregation is desirable in education" has lost any opportunity of expressing that belief if by the Thirteenth or any other amendment all public or private schools must become desegregated. The rulings below therefore diminish the *Pierce* right of these parents, limiting their right to associate for the practical expression of their beliefs.

2. Does the Thirteenth Amendment purport to diminish *Pierce* rights? Certainly not in words or in its statutory extension as noted above in Point III. Nor, as three judges below have pointed out, is such an implication mandated by anything stated in the decisions of this or any lower court. In short there does not apear to be any implied, much less necessary, conflict between the two.

3. But if we assume *arguendo* that such a conflict does arise, the resolution would still favor the preservation of First Amendment liberties to all people regardless of race. Personal liberties preserved by the Bill of Rights are "preferred" over other rights deriving from the Constitution, *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946), *Griswold* v. *Connecticut*, *supra*. Moreover,

> The Constitution is concerned with practical substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning.
>
> *Fed. Housing Admin.* v. *Darlington*, 358 U.S. 84, 91 (1958).

This principle is fully applicable here. These plaintiffs plainly have a *Pierce* right through their parents to select an integrated or racially segregated school of their choice, public or private in the first case, private in the second. But the decisions below give them an added right, to compel the desegregation of other private schools. Given the alternatives available to every parent, this is not a

practical or substantial right but rather is one asserted here for the purpose of bringing this action.

To the contrary, the *Pierce* rights of the SISA parents are necessarily substantial, since, unlike the plaintiffs here, they have no alternative method of expressing their particular beliefs. Therefore even if we assume the existence of a conflict between the First and Thirteenth Amendments, the liberties of the Bill of Rights would still be preferred and § 1981 would be void to the extent that it purported to diminish them.

V

The Constitution Contains No Double Standard For Right or Wrong Types of Belief

The cases show no lack of judicial recognition of the freedom of conscience of the individual and his right to an opportunity for its reasonable expression. A state cannot forbid the teaching of whatever foreign language, *Bartels* v. *Iowa*, 262 U.S. 404 (1923) or the theory of evolution, *Epperson* v. *Arkansas*, 390 U.S. 941 (1968) even in its public schools. Rights cannot be taken regardless of how ethnic the associated belief may be, *Cooper* v. *Pate*, *supra*, at 521, *Kotohira Jinsha* v. *McGrath*, 90 F. Supp. 892 (D. Haw. 1950), nor may a court evaluate political acceptability of belief, *Healy* v. *James*, 408 U.S. 169 (1972), *Bachellar* v. *Maryland*, 397 U.S. 564 (1970).

In *Griswold*, *supra*, you cited *Button* to the effect that an association to advance the "social, legal, and economic benefit of the members" of a single race was a protected activity (381 U.S. 479, 483 (1965)) and in *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) you said,

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred

> position in our basic scheme. *Schneider* v. *State*, 308 U.S. 147, 60 S.Ct. 146, *Cantwell* v. *Conn.*, 310 U.S. 296, 60 S.Ct. 900.

But such a distinction of "right" and "wrong" thinking is nevertheless growing in the courts today, reviving the practice of distinguishing between Constitutional rights on the basis of a judicial moral evaluation of the type of discrimination involved—which in the usual case regards racial segregation as "by far the most evil form . . ." *Weise* v. *Syracuse Univ.*, *supra* at 406; *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968).

> Moreover, we have recognized a "double standard" in state action—"one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims," *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1974)
>
> *Weise* v. *Syracuse Univ.*, *supra*, p. 405.

To put private beliefs into "good" or "evil" categories directly denies the basic freedom here contended for and returns to the emotional form of legal thought which at one time in our history sustained the Alien and Sedition Acts. Yet, in one form or another popular antipathy to this particular belief is found in many decisions often rationalized as interpretations of undefined legal concepts such as "state action", "equal protection" or even § 1981 itself.

For example, the Court below ruled,

> Among private schools, [parents] are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants *on the basis of neutral principles*, may not exclude on the basis of race. (A. 14) (*Emphasis added*)

What are "neutral principles"? Clearly a distinction by race is not. Or is a principle "neutral" if any but the white race is meant—as the District Court has here held?

To take an example, both Courts below have referred to your *Sullivan* decision as holding that there could be no such thing in law as "private" discrimination if there is "no plan or purpose of exclusiveness other than race" (A. 15, 139). As SISA reads the *Sullivan* decision the comment given below was improperly lifted out of context, and would be directly contradicted by *Moose Lodge* v. *Irvis, supra*, but it illustrates the adoption of a principle of regarding racial belief as peculiarly evil.

In the opinion of SISA, this judicial rejection of any private belief in the values of white ethnic association follows from press stereotypes which have risen to the status of a legal fiction requiring Courts to refuse to consider any evidence which might refute it, a rejection usually—if mistakenly—justified by unspecific reference to your decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (A. 133).

But if such evidence were received it would be seen that the attitude so expressed by the Courts is wrong in law and wrong on the facts.

A. *Private Schools*

Private schools for selective groups both religious and secular appear to have always been a part of education, Kramer, S.N. *From the Tablets of Sumer* p. 5 (Falcon Press, Colo. 1956). The most recent government publication on the subject is apparently HEW publication OE 74-11420 "Statistics of Non-public Elementary and Secondary Schools, 1970-71". This publication lists 16,453 private schools in the United States (Table C, p. 6) enrolling 10% of the nation's school population (Table ii, p. 28). This enrollment includes a quarter million Negro children (Table 27, p. 71), comprising 4.8% of the number of all children attending in private schools (Table 26, p. 70).

In the Southeast region where the SISA schools are located, the publication lists 2,355 private schools (Table C, p. 6) enrolling 6.1% of the local school population (Table ii, p. 28). This enrollment includes 52,522 Negro children (Table 27, p. 71) or 8.2% of the regional registration (Table 26, p. 70). Or, if we take all minorities in the Southeast, they are 29.2% of the public school enrollment and 11.6% of the private school enrollment (Table L, p. 16).

Of our national total of 16,453 private schools as given by OE 74-11420, 14,270 or 86% are shown as church-affiliated (Table C, p. 6). Private schools grouped by race, sex, or national origin are not separately tabulated by HEW and are difficult to identify. But they do exist. This Court referred to "163 [Asiatic] foreign language schools" in Hawaii, *Farrington* v. *Tokushige*, *supra* at pp. 290-291. In that State we could add the Kamehameha schools which require a showing of Hawaiian ancestry for admission. HEW lists 20,968 Native American Indians enrolled in private schools (Table 27), presumably a total which does not include the publicly-financed all-Indian reservation schools.

All-Negro schools have been occasionally mentioned. Apart from whatever number of Black Muslim schools may exist, twelve all-Negro private schools in Mississippi were identified by a Rev. Jas. D. Gilbert (Dep. Jan. 30, 1970, Exh. 1) in *Green* v. *Kennedy*, *op. cit.* Similar schools in Pennsylvania were described at pp. 49-51 of the appellant's brief in *Lemon* v. *Kurzman*, 403 U.S. 602, (1971).

A random selection of 100 other special purpose tax exempt educational organizations out of 33,000 listed by the Internal Revenue Service, was filed by SISA in the District Court (A. 168-172).

Many, possibly most, private schools are racially integrated. The Council for American Private Education,

which includes a "Southern Association of Independent Schools", was granted leave to file a brief *amicus* in the Court below (R. Vol. V, p. 16) claiming membership of 734 secular private racially integrated schools (p. 1) of which 138 (p. 2) were said to be located "in the same area of the country as the schools which are affiliated in [SISA]" (p. 13).

Classifying any private school as either ethnic or religious is ambiguous in itself. The *amicus* brief of the National Jewish Commission on Law and Public Affairs, June 16, 1970 filed in *Green* v. *Kennedy*, (*Coit* v. *Green*) D.D.C., Civ. No. 1355-69) stated,

> Central to the faith and practice of Orthodox Judaism is the obligation of every religiously observant parent to provide for the extensive and thorough religious education of his child. For this reason, the continued vitality and development of Jewish religious all-day schools in the United States—which now number more than 300—is of paramount importance to the Orthodox Jewish Community . . . we believe it essential to refute *in limine* suggestions of the kind made repeatedly by opponents of religious schools that they are, in one form or another, established or supported in order to achieve the segregation of schoolchildren by race. (pp. 1-3)

In some cases there is no significant dividing line between the secular and the religious, *Wash. Ethical Soc.* v. *District of Col.*, 249 F.2d 127 (D.C. Cir. 1957) and in others race and religion merge and find expression in schools of religious/ethnic/national origin grouping, e.g. Black Muslims, Shinto, the Native American Church, and Amish or Mennonite schools.

In sum, while a tenth of the children in this country attend private schools, only a tenth of these—or about 1% of the overall total—attend secular private schools. Of this 1% some unknown proportion attends private

schools segregated into groups representing every race, national origin and sex (A. 168-172) while the rest presumably attend integrated private schools. The total of all schools segregated purely by any race is therefore a *de minimis* factor in the overall picture of education in this country but the diversity is still such that every parent retains an ability to select either integrated public education, or integrated or segregated private schooling to suit their particular secular or religious beliefs or philosophies.*

B. *SISA Schools Do Educate*

Whether or not integrated public schools do polarize racial self-identification is a matter of considerable debate. Whether the end result to be achieved by schools is social adaptation or the acquisition of academic skills is equally a matter for learned disputation. But whatever ultimate conclusions may result from these debates is not the point here. Our question is merely one of the right of parents to choose for themselves between such conflicting theories.

Most SISA schools offer a curriculum designed for college preparation on standard subjects, and continue the minor patriotic and religious observances (A. 167) which are now excluded from public school functions [*W. Va.* v. *Barnette, etc.*] but which some parents continue to prefer.

> Private schools may propagate a sectarian viewpoint, while public schools may not.

* * * *

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* This local availability of alternate school options is almost always ignored by writers who comment on the SISA schools, e.g. "Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination" 84 *Yale L.J.* 1441 (1975).

> In addition, private schools may discourage criticism and irreverence toward existing institutions or policies while public schools may not.
>
> *Bright* v. *Isenbarger*, 314 F. Supp. 1382, (N.D. Ind. 1970) *aff'd per curiam* 445 F.2d 412 (1971)

SISA schools are popularly referred to as "flight schools", "segregation" or "rebel yell" academies and the like. The innuendo is that these schools exist to express a die-hard political belief rather than an educational advantage, e.g. Note, 82 *Yale L.R.*, pp. 1436-61 (1973).

The SISA evidence, which the District Court refused to admit is altogether to the contrary. As summarized by the District Court such evidence, uncontradicted on the record, would have shown

> That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies (A. 140).

By affidavit, SISA showed that its schools on the basis of standardized tests were advanced academically by a year and a half to two years over their local public schools (A. 166) while operating at low per-pupil costs. To the extent therefore that parents retain a constitutional right to select a private school even for scholastic reasons alone, the SISA schools offer the kind of education many such parents would choose.

The belief that more competent education can be found outside the public school system is not an idea unique to SISA parents. As once stated by Professor Bickel,

> It is all too facile, and not a little self-righteous, to ascribe resegregation purely to racism. After all, there is a good reason to believe that when the middle class becomes a minority in a classroom, the educational process, as conceived from its point of view, suffers.

Hearings, Select Committee on Equal Educational Opportunity, United States Senate, 91st Cong. 2d Sess. Pt. 3E at 2265, (September 24, 1970).

C. *Segregation May be Desirable in Education.*

SISA knows that this statement is popularly regarded as a form of educational heresy and recognizes that this Court was undoubtedly expressing its utter disbelief in the possible truth of this principle in the quoted statement from *Norwood*. Yet, emotion apart, and considered from the point of view of a question of educational method, the answer is not simple but is rather one of considerable technical difficulty. Both by affidavit and proffer SISA tendered evidence that the racial coherence of a student group is in fact causally related to better education (A. 165, 226-A). The District Court accepted the fact that the testimony of SISA's expert would be to that effect (Inter. Exh. 1, A. 149), a principle not only true as to white children but equally so for every type of group definition whether racial, sectarian, or by national origin, sex, or economic level, a pedagogy that finds an inverse relation between learning in the classroom and the sum of the pupil conflicts present. SISA offered to prove that substantial educational theory exists to show that among the several races, differing learning patterns are a characteristic of each group without regard to the high or low level of an individual student's capacities, (Inter. Exh. No. 2, A. 154).

Recently an Indian group claimed the same necessity for their race, *Wind River Indian Educ. Ass'n* v. *Ward*, (No. 74-1568, *cert. denied*, —— U.S. ——, 96 S.Ct. 205 (1975)). Programs in black studies have been approved. The City of Philadelphia unsuccessfully tried to show a court recently that graduates of all-girl schools did better in college than girls graduating from co-educational high schools. Some of the Court's findings were

> 32. The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance.
>
> 33. There are educators who regard education in a single-sex school as a natural and reasonable approach.
>
> 34. . . . She first found that the percentage of women graduating from women's colleges who were later listed in Who's Who was two to three times greater than the percentage of women so listed who were graduates of coeducational institutions.
>
> . . .
>
> 38. Dr. Tidball testified that it would not be unreasonable to apply her findings to the secondary level, including academic high schools. . . .
>
> *Vorchheimer* v. *School District of Philadelphia*, 400 F. Supp. 326, 329-30 (E.D.Pa. 1975)

In short, whatever may be thought to be the social values of public school integration, there is competent evidence to indicate that coherent group instruction can be more effective academically than classroom heterogeneity. Whether or not a belief that this is true will receive ultimate acceptance by educators, SISA parents do at least have rational grounds to believe that "segregation is desirable in education"—and it can hardly be said that the scholastic and disciplinary accomplishments of the SISA schools have proven such belief to be in error.

D. *SISA Schools Do Accord with National Policy.*

The maintenance of a pluralistic culture is a nationally expressed policy.

> Independent schools in the United States exemplify the commitment of their benefactors to the American free enterprise system—and, in a sense, to freedom itself. . . .

> Twenty-four Presidents of the United States were educated in private colleges and universities, as were 287 Senators and Representatives serving in the present Congress. . . .
>
> I am all for an open marketplace for ideas and learning experiences.
>
> Private institutions both complement and compete with public education in America—and millions of Americans have enjoyed the diversity of benefits this dual system has produced. I believe that every American who has a desire to learn should be given the chance to learn.
>
> Address by President Ford at Pepperdine University, Reprinted in *Firm Foundation*, November 4, 1975 at p. 3 [691].

The same thought was earlier expressed by a specially appointed commission.

> One significant way in which nonpublic schools serve the public purpose is that they provide diversity, choice and healthy competition to a traditional public education. There are many who equate diversity and pluralism with divisiveness and polarity. They argue that the very persistence of ethnic and cultural differences causes prejudices and discrimination. They hold that a major function of education is to eliminate these differences and create a more pervasively American ethos and culture.
>
> Without passing on the desirability of the persistence of differences or in any way attempting to design the future of American culture, we must remember that differences do exist. Where they are submerged or repressed and cannot be expressed through social and political institutions they eventually erupt in detrimental ways. At the very least then, nonpublic schools serve the public purpose by providing the means for a substantial group of Americans to express themselves socially, ethnically,

culturally, and religiously through educational institutions.

> *Final Report of the President's Commission on School Finance*, U.S. Govt. P. Off., March, 1972, pp. 53-54.

Or, as the value of pluralism has been put by this Court,

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. *West Virginia State Board of Education, et al.* v. *Barnette, et al.*, 319 U.S. 624 (1943)

That a pluralistic viewpoint may not always dictate the same result as a national policy of public school integration is simply to state a conflict that exists between diverse goals of society.*

This contradiction, however, should not be solved by judicial or other compulsion, a compulsion that would necessarily place this Court in the position of not merely ruling on what is legal or non-legal, but what is desirable

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* "The American Roman Catholic bishops have approved for bicentennial use an ethnic mass that departs from the 'melting pot' theory and recognizes the pluralistic traditions coexisting in the United States." *The Washington Post*, Sunday, Dec. 21, 1975, p. B-8.

or undesirable in the application of the Constitution to our society.

> Our individual preferences, however, are not the constitutional standard.
>
> *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952)

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not now occur to us.
>
> *West Va.* v. *Barnette*, *supra* at 642.

The same distaste for imposed solutions is to be found in professorial comment,

> The right of the government to *compel* personal associations, as by forbidding racial discrimination in schools . . . must be framed in terms of drawing the line between the public and private sectors of our common life.
>
> Emerson, "Freedom of Association and Freedom of Expression" 74 *Yale L.J.* 1, 20 (1964)

Professor Wechsler has said much the same,

> But if the freedom of association is derived by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension not unlike many others that involve the highest freedoms that Professor Sutherland has recently described. See *The Law and One Man Among Many* (1956), 35 et seq.
>
> Prof. Herbert Wechsler (Oliver Wendell Holmes Lecture, Harvard, 1959) "Toward Neutral Principles of Constitutional Law" (p. 39).

CONCLUSION

This petitioner prays a reversal of the rulings below and reinstatement of its counterclaim on the grounds (1) that the issue has not been foreclosed by the prior decisions of this Court, (2) that to the contrary, three prior rulings support petitioners position, (3) that in any event § 1981 does not compel private school admission, (4) that if it did, it would violate the constitutional freedom of parents to select petitioner's schools, and (5) that their choice in this regard is in accord with the national policy of pluralism in our society.

Respectfully submitted,

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